Chung Khiaw Bank Ltd v The Government of the State of Sabah & Ors

SUPREME COURT (KOTA KINABALU) — CIVIL APPEAL NO 01-51 OF 1993
PEH SWEE CHIN, MOHAMED DZAIDDIN SCJJ AND CHARLES HO J
14 APRIL 1994

Land Law *— Acquisition of land — Compensation — Compulsory acquisition by state government of charged land — Correct principle to follow when apportioning compensation between chargor and chargee — Whether government valuer's formula could apply to charged property — Sabah Land Acquisition Ordinance (Cap 69) s 14*

Land Law *— Acquisition of land — Compensation — Compulsory acquisition by state government of charged land — Total compensation sum very much less than outstanding loan due to chargee — Whether inequitable to make any apportionment of compensation sum — Sabah Land Acquisition Ordinance (Cap 69) s 14*

The fourth respondent was the registered owner of several pieces of land in Sabah ('the property') and had charged the property to the appellant as security for a loan of RM1.4m. As at 31 March 1991, the amount due and owing by the fourth respondent to the appellant was RM5,401,348.57. In March 1991, the Government of Sabah compulsorily acquired part of the property for highway construction. The High Court made an award of RM704,915.40 as compensation for the acquired portion and apportioned the said amount by awarding RM567,245.90 to the fourth respondent and RM137,669.50 to the appellant. The court made the apportionment on a method formulated by the government valuer, which was based according to the value of the quantum of interest a party loses by reason of the acquisition.

The appellant has appealed. Counsel for the appellant submitted that it would be inequitable to apportion the said amount as it would contravene the principle of indivisibility of the charge and the appellant's interest as chargee of the property. The issue before the court was therefore what the correct principle to follow was when apportioning the compensation money between a chargor and chargee.

Held, allowing the appeal:

(1) The learned judge was wrong in principle when he applied the general principles of apportionment to a special situation involving a chargor and chargee. In the circumstances of the present case, the government valuer's formula, which is of general application, cannot apply to a charged property since a charge is indivisible and the security was attached to the whole property. Therefore, until the property is discharged, the interest of the appellant is on the whole property and any proceeds of the sale of the property will attach to the property.

(2) Moreover, the area acquired by the state government was a portion of the property and the total compensation sum for the acquired

portion was very much less than the outstanding loan due to the appellant. Therefore, it would be inequitable to make any apportionment of the compensation sum as between the parties.

Per curiam:

(1) The Sabah Land Acquisition Ordinance (Cap 69) ('the Ordinance') does not provide any rules to determine the method of apportionment between the various persons interested. Under its interpretation section, 'person interested' means every person claiming, or entitled to claim compensation under the Ordinance. It is trite that the broad general principle to follow is that every person interested for which the notice of acquisition has been given under the Ordinance should be compensated for the loss he suffers as a result of the acquisition.

(2) Although *Topan Das v Jesaram*[1] was decided on s 73(2) of the Indian Transfer of Property Act, which has no equivalent in Sabah, the principles laid down there appeared to be applicable to the present case.

[Bahasa Malaysia summary

Responden keempat merupakan tuanpunya berdaftar beberapa bidang tanah di Sabah ('tanah itu') dan telah menggadai tanah itu kepada perayu sebagai cagaran untuk suatu pinjaman sebanyak RM1.4 juta. Jumlah yang masih terhutang oleh responden keempat kepada perayu pada 31 Mac 1991 berjumlah sebanyak RM5,401,348.57. Pada bulan Mac 1991, Kerajaan Sabah telah mengambil sebahagian daripada tanah itu secara wajib untuk membina lebuhraya. Mahkamah Tinggi telah membuat suatu award sebanyak RM704,915.40 sebagai pampasan untuk bahagian yang telah diambil secara wajib dan telah mengumpukkan jumlah itu dengan mengaward sebanyak RM567,245.90 kepada responden keempat dan RM137,669.50 kepada parayu. Mahkamah telah membuat pengumpukan itu berdasarkan suatu cara yang telah dirumuskan oleh penilai kerajaan, yang berdasarkan nilai kuantum kepentingan yang sesebuah pihak rugi disebabkan pengambilan itu.

Perayu telah membuat rayuan. Peguambela perayu telah berhujah bahawa adalah tidak adil jika jumlah itu diumpuk kerana ia akan melanggar prinsip bahawa sesuatu cagaran tidak boleh dibahagi dan kepentingan perayu sebagai pemegang gadaian tanah itu. Oleh itu, isu di hadapan mahkamah adalah sama ada prinsip yang betul telah digunakan apabila mengumpuk wang pampasan di antara penggadai dan pemegang gadaian.

Diputuskan, membenarkan rayuan itu:

(1) Hakim yang arif telah membuat kesilapan dari segi prinsip apabila beliau mengunakan prinsip am pengumpukan kepada suatu situasi yang istimewa yang melibatkan penggadai dan pemegang gadaian. Di dalam keadaan kes ini, rumusan penilai kerajaan, yang boleh

dipakai secara am, tidak terpakai kepada tanah yang telah digadai kerana suatu cagaran tidak boleh dibahagi dan cagaran itu dikenakan ke atas seluruh tanah itu. Oleh itu, sehingga tanah itu dilepaskan, kepentingan perayu terletak pada keseluruhan tanah itu dan semua wang yang didapati daripada penjualan tanah itu akan terletak pada tanah itu.

(2) Lebih-lebih lagi, bahagian yang telah diperolehi oleh kerajaan negeri itu merupakan sebahagian daripada tanah itu dan seluruh wang pampasan untuk bahagian yang telah diperolehi itu jauh kurang daripada pinjaman yang masih terhutang kepada perayu. Oleh itu, adalah tidak adil untuk membuat sebarang pengumpukan jumlah wang pampasan di antara pihak-pihak itu.

Per curiam:

(1) Sabah Land Acquisition Ordinance (Cap 69) ('Ordinan itu') tidak memperuntukkan sebarang kaedah untuk menentukan cara mengumpukkan wang di antara berbagai orang yang mempunyai kepentingan. Di bawah seksyen tafsirannya, 'seorang yang mempunyai kepentingan' bermakna sesiapa sahaja yang menuntut, atau berhak menuntut pampasan di bawah Ordinan itu. Adalah menjadi undang-undang mantap bahawa prinsip am yang luas yang diikuti adalah bahawa semua orang yang mempunyai kepentingan dan di mana notis pengambilan telah diberi kepada mereka di bawah Ordinan itu, sepatutnya diberi pampasan kerana kerugian yang telah dialami disebabkan pengambilan secara wajib itu.

(2) Walaupun *Topan Das v Jesaram*[1] telah diputuskan atas s 73(2) Indian Transfer of Property Act, yang tidak mempunyai persamaan di Sabah, prinsip yang telah dinyatakan di situ nampaknya terpakai kepada kes ini.]

Notes

For cases on compensation for land acquisition, see 8 *Mallal's Digest* (4th Ed) para 923; [1990] Mallal's Digest 980; [1991] Mallal's Digest 1343–1347.

For a case on compulsory acquisition of land by state government, see 8 *Mallal's Digest* (4th Ed) para 924.

Cases referred to

1 *Topan Das v Jesaram* 17 PR 1907 (folld)
2 *Pratap Chand v Nathu Ram* 103 PLR 1909 (refd)
3 *P Valia Raja v TS Veeraraghava Iyer* AIR 1961 Kerala 222 (FB) (refd)

Legislation referred to

Civil Law Act 1956 s 3(1)(b)
Sabah Land Acquisition Ordinance (Cap 69) s 14

Appeal from: Originating Summons No T15 of 1991 (High Court, Tawau)

Alex Khoo (*Wong Kum Heng*) (*Peter Lo & Co*) for the appellant. A

Mohd Salleh Lamsin (State Senior Counsel) for the first, second and third respondents.

Mohd Anuar Datuk Ghani (*Anuar Datuk Ghani & Associates*) for the fourth respondent.

Cur Adv Vult B

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This is an appeal from the decision of the High Court Tawau given on 9 September 1993 on the question of an apportionment of compensation made by the trial judge sitting with two assessors under s 14 of the Sabah Land Acquisition C Ordinance (Cap 69) ('the Ordinance'), which states:

(1) All questions and claims relating to the payment of compensation under this Ordinance and to the apportionment of such compensation shall, save as is hereinafter provided, be submitted to a Judge.
(2) The Judge shall have full power to assess, award and apportion compensation in such cases, in accordance with the provisions of this Ordinance: D

The following account of the facts of the case is taken from the grounds of decision of the learned trial judge. The fourth respondent is the registered owner of seven pieces of property bearing Title Nos CL115312591, CL115312608, CL115313310, CL115107974, CL115312644, E CL115313276 and CL115313294 in Lahad Datu ('the said property'), comprising an approximate area of 161.214 acres. By a memorandum of charge executed on 9 August 1968 under Memorial No 92666, he charged the said property to the appellant as security for a loan of RM1.4m. As at 31 March 1991, the amount due and owing by him to the appellant was RM5,401,348.57. Some time in March 1991, the Government of F Sabah compulsorily acquired 4.141 acres of the said property for highway construction. On 9 September 1993, the High Court made an award of RM704,915.40 as compensation for the acquired portion and apportioned the said amount by awarding RM567,245.90 to the fourth respondent and RM137,669.50 to the appellant. It is to be noted that the amount to be paid G to the appellant was very much less than the outstanding debt due to them under the charge.

The court made the apportionment on a method formulated by the government valuer, which was based according to the value of the quantum of interest a party loses by reason of the acquisition. The value of the quantum of interest which the appellant lost was assessed as follows: H

$$\frac{\text{Loan outstanding as at 31 March 1991 (A)}}{\text{Total area of charged titles (B)}} = \text{Rate of loan}$$

$$\frac{\text{RM5,401,384.57}}{\text{161.214 acres}} = \text{RM33,504.22 per acre}$$

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$$\text{say} = \text{RM33,500.00 per acre}$$

Therefore, the appellant's share of the compensation of RM137,669.50 was arrived at by multiplying RM33,500 by 4.141 acres (the area acquired).

A The learned judge preferred the above method of apportionment and rejected entirely the appellant's claim that there should not be any apportionment, but instead the whole amount be paid to them. In his grounds of judgment, his Lordship stated (at pp 44–46 of the appeal record):

B The most preferred method should be an apportionment according to the value of the quantum of interest which a party loses by reason of the acquisition. See Sanjiva Row on the *Law of Land Acquisition and Compensation* (7th Ed) at p 74, an authority cited by counsel for the chargee. ...

Counsel for the chargee relied on, to support his contention that the whole amount should be paid to the chargee, the following passage of the said author C at p 78, viz:

> 'When a portion of the mortgaged property is acquired and the compensation money awarded is less than the amount due under the mortgage, the mortgagee is entitled to the entire compensation money payable to the mortgagor.'

D But that passage was a comment on a s 73(2) of the Indian Transfer of Property Act which reads:

> 'Where the mortgaged property or any part thereof or any interest therein is required under the Land Acquisition Act 1894, or any other enactment for the time being in force governing the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of mortgage E money, in whole or in part out of the amount due to the mortgagor as compensation.'

There is no similar statutory provision in Sabah. Another reason for rejecting the proposition is this. When a loan is required from a financial institution, the financial institution, almost invariably, requires a valuation report of the property F concerned which is to serve as security for the loan. One of the factors which the bank takes into account is the value of the property. A bank, except in cases where Bank Negara requires, seldom, if ever, lends money equal to the value of the property offered by the borrower as security. There is, therefore, no reason why the bank should get the full amount of the compensation representing the full market value of the property when the bank was not prepared to grant a loan G equivalent to the full market value of the property. The method adopted by the government is more equitable. If there is evidence that the chargee had given the loan equivalent to the full market value of the properties at the time of the loan, then it would be equitable to apportion the moneys in a manner that the loan of the chargee is satisfied before the landowner can get any of the moneys. But there is no evidence that the chargee had given the loan equivalent to the full market H value of the properties at the time of the loan.

We pause to observe here that whilst giving his reasons for rejecting the appellant's propositions, the learned judge seemed to offer no reason why he preferred the valuer's formula.

Before us, Encik Alex Khoo, counsel for the appellant, attacked the I formula adopted by the government valuer which the trial judge had accepted to be too simplistic, although he did not say or qualify why it was so. Counsel, however, contended that the appellant should have been paid the whole amount of compensation as the appellant was the chargee of the whole of the said property and the amount awarded was less than the debt

owing by the fourth respondent to the appellant under the charge. The authority most strongly relied upon by Encik Khoo in support of his proposition was the decision of an Indian appellate court in *Topan Das v Jesaram*,[1] in which it was held that when a portion of the mortgaged property is acquired and the compensation money awarded is less than the amount due under the mortgage, the mortgagee will be entitled to the whole of the compensation awarded. Counsel further submitted that it would be fundamentally wrong, indeed inequitable, to apportion the said amount as this would contravene the principle of indivisibility of the charge and the appellant's interest as chargee of the whole of the said property.

Encik Mohd Salleh, for the state government, wholly supported the finding of the learned trial judge. The state counsel submitted that both the landowner and the chargee have a right to the compensation. He relied on a passage in VG Ranachandran, *Law of Land Acquisition and Compensation*, (6th Ed, 1979) at pp 296–297, for the proposition that an authorized officer, whose power in the instant case is vested under the Ordinance, should apportion the sum awarded amongst the persons interested as far as possible in proportion to the value of their interest, that is to say, he should try to apportion to the best of his judgment. Counsel pointed out that the learned writer quoted the case of *Pratap Chand v Nathu Ram*[2] in which it was stated that in the case of a mortgaged land, the landowner must pay off the mortgaged amount in proportion to the land acquired. Counsel further submitted that the trial judge had rightly rejected the principles in *Topan Das*[1] because the case was irrelevant as it was based on the Indian Land Acquisition Act 1894 which has no local equivalent.

Encik Mohd Anuar, for the fourth respondent, also supported the decision of the trial judge. In addition, counsel submitted that *Topan Das*,[1] which dealt with mortgages as opposed to legal charges, could not apply to the instant case since any reception of the English law (meaning, perhaps, the law of mortgages) would contravene s 3(1)(b) of the Civil Law Act 1956 which provides that English statutes of general application shall only apply if no express provisions have been made in Sabah. But, Sabah has its own Land Ordinance.

We would observe that the Ordinance does not provide any rules to determine the method of apportionment between the various persons interested. Under its interpretation section, 'person interested' means every person claiming, or entitled to claim compensation under the Ordinance. It is trite that the broad general principle to follow is that every person interested for which the notice of acquisition has been given under the Ordinance should be compensated for the loss he suffers as a result of the acquisition. Now, the question before us is: what is the correct principle to follow when apportioning the compensation money between a chargor and chargee? The next question, which is fundamental to this appeal, is whether the learned judge erred in principle when he apportioned the compensation money between the fourth respondent and the appellant, instead of awarding the whole amount to the latter.

Aggarwala on *Compulsory Acquisition of Land in India* (1992 Ed) at p 757 in dealing with the principles of apportionment, says that in apportioning

A the market value of the land acquired amongst several persons interested, such as a mortgagor and mortgagee, a landlord and tenant, the distribution should as far as possible be such as given to each the value of the quantum of interest which he loses by reason of the acquisition. In our view, the learned author above is merely stating a general principle which he has
B emphasized in the next passage of his treatise (at p 759):

> The following observations by the Bombay High Court in *Dossibai Nanabhoy Jeejeebhoy v PM Bharucha* (1958) 60 Bom LR 1208 were cited with approval by the Gujarat High Court in *Saraswati v Bharathkhand Textile Mfg Co* AIR 1967 Gujarat 36 at p 40:
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> C 'In apportioning the compensation, the court has to give to each claimant the value of the interest which he has lost by compulsory acquisition. So stated, the proposition may appear simple, but in its practical application numerous complicated problems arise in apportioning the compensation awarded. The difficulty experienced is due to the nature of a variety of interests, rights and claims to land which have to be valued in terms of money. The compensation awarded for compulsory acquisition is the value
> D of all the interests which are extinguished and that compensation has to be distributed equitably amongst persons having interest therein and the court must proceed to apportion the compensation so that the aggregate value of all interests is equal to the amount of compensation awarded.'

However, in *P Valia Raja v TS Veeraraghava Iyer*,[3] the court, holding that
E the apportionment should be quite proportionate to the value of interest which each party has in the property acquired, observed: 'What these interests are is the question to be decided and the same can be evaluated on the basis of the rights that each had in the property at the time of acquisition.'

As we have stated earlier, in the instant case, we are dealing with the
F apportionment between the chargor and chargee. Following the observation in *P Valia Raja*,[3] the primary consideration here is the right and interest of the appellant as chargee of the said property. In our opinion, the learned judge was wrong in principle when he applied the general principles of apportionment to a special situation involving a chargor and chargee. In the circumstances of the instant case, the government valuer's formula, which
G is of general application, cannot apply to a charged property since a charge is indivisible and the security is attached to the whole property. It follows that until the property is discharged, the interest of the appellant is on the whole property and any proceeds of the sale of the property will attach to the said property. Secondly, based on the above consideration and bearing
H in mind that the area acquired by the state government was a portion of the said property and that the total compensation sum for the acquired portion was very much less than the outstanding loan due to the appellant, it would be inequitable to make any apportionment of the compensation sum as between the parties. The conclusions which we have expressed above are supported by the ratio decidendi in *Topan Das*,[1] an authority not only
I directly on the point in issue but sound in principle. There, the appeal was from an order under the Indian Land Acquisition Act 1894, awarding to a mortgagee of the land acquired, a sum out of the compensation awarded proportionate to the area acquired as compared with the area mortgaged.

Reid J, in his deliberation, examined the authorities and stated (at p 82): A

> The authorities cited are (1) *Gostobehary Pyne v Shib Nath Dut* ILR, XX Calc 241 a case in which a patni taluk had been sold for arrears of revenue and the mortgagee thereof claimed surplus sales proceeds. The court said:
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> > 'We think that the proper view to take of the matter is to regard the surplus sales proceeds as the shape into which the mortgage security is converted and, B as before such conversion the security could not be split up into parts and the mortgagee was entitled to realize his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect.'
>
> The ruling was under s 73 of the Transfer of Property Act, but the principle laid down appears to be applicable to the present case.
>
> (2) *Ghose on Mortgages* (3rd Ed) at pp 332–333, in which authority is cited, for C the rule that, if the mortgaged property is converted into money under circumstances which prevent the mortgagee from following such property, the security will attach to the purchase money. The author adds that as the security of the mortgagee is indivisible the charge would fasten upon the whole proceeds and not on any particular part.

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Following the principles laid down from the above authorities, his Lordship allowed the appeal and held (at p 84):

> A mortgagee is entitled to take as much security as he can get for his money, and when part of the land mortgaged is taken from him, his security is diminished pro tanto. In the present case the security has been diminished to the extent of Rs E 410-6-0, and the mortgagee is, in my opinion, entitled to that amount in liquidation of the mortgage debt, the indivisibility of the mortgage attaching itself to the proceeds of the sale of part of the land mortgaged and the whole and each part of that land being security for the whole amount advanced.

It is interesting to note that the learned trial judge refused to follow the ratio F of *Topan Das*[1] because, according to him, the case was decided on s 73(2) of the Indian Transfer of Property Act, which has no similar statutory provision in Sabah. Granting that the Indian Court was dealing with its own Transfer of Property Act, which has no equivalent in Sabah, yet, we entirely agree with Reid J (at p 82) that although the ruling was made under s 73 of the Transfer of Property Act, 'the principle laid down appears to be G applicable to the present case'. At this juncture, we would like to say that the submission of Encik Mohd Anuar on *Topan Das*[1] in the context of s 3 of the Civil Law Act 1956 was quite misplaced.

Therefore, for reasons stated above, we allow this appeal with costs. Accordingly, we set aside the order of the apportionment and direct the H whole of the compensation money be paid to the appellant toward part-payment of the debt due from the fourth respondent to the appellant under the charge. Deposit of the appeal is refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim I